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MARCEL JUDE MS JOSEPH

v.

SABAH STATE LEGISLATIVE ASSEMBLY

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HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[SUIT NO: BKI-21-4-1-2013]
8 JULY 2013

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CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of religion - Whether includes right to public holidays on religious observance days - Federal Constitution art. 11*

D

CONSTITUTIONAL LAW: *Legislation - Validity, of - Amendment to Holidays Ordinance of Sabah to remove Easter Saturday, Easter Monday and Boxing Day from public holiday list - Whether violation of religious freedom under art. 11 of Federal Constitution - Whether amendment unlawful and ultra vires Federal Constitution and State Constitution*

E

CONSTITUTIONAL LAW: *Legislature - State legislative powers - Amendment to the Holidays Ordinance of Sabah to remove Easter Saturday, Easter Monday and Boxing Day from public holiday list - Whether violation of religious freedom under art. 11 of Federal Constitution - Whether amendment unlawful and ultra vires Federal Constitution and State Constitution*

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The plaintiff contended that the Sabah State Legislative Assembly ('defendant') had amended the Holidays Ordinance of Sabah ('Ordinance') in 1978 to the detriment of the Christians by removing Easter Saturday, Easter Monday and Boxing Day from the public holiday list of the Ordinance. Prior to 1978, all the said days were public holidays. The plaintiff claimed that the removal of these public holidays had violated his right to religious freedom under art. 11 of the Federal Constitution. Hence, the plaintiff prayed, *inter alia*, that the degazetting and abolition of the said public holidays be declared unlawful and *ultra vires* art. 11 of the Federal Constitution and the Ordinance. The defendant applied to strike out the suit under O. 14A of the Rules of Court 2012 upon determination of the following questions of law: (i) whether the amendment to the Ordinance was lawful under the Federal Constitution and State Constitution; and (ii) whether the amendment of the Ordinance was in conflict with the provision of the Federal Constitution and State Constitution.

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Held (striking out writ of summons and statement of claim with costs):

(1) The defendant had the power to amend the Ordinance. Article 74 of the Federal Constitution provides that the Legislature of a State may make laws with respect to any of the matters enumerated in the State List which is the Second List set out in the Ninth Schedule. Item 8 of the Ninth Schedule reads, 'State Holidays'. Hence, the subject matter of State Holidays is within the power the defendant to legislate upon. (para 10)

(2) The State and Federal Constitutions do not declare any religious holidays as public holidays. In the premises, it could not be said that the removal of the religious holidays from the Ordinance directly conflicted with the State or Federal Constitutions. (para 10)

(3) Article 11 does not provide a constitutional right to public holidays on religious observance days. The right to practice and profess one's religion does not include any such right unless clearly provided by the letter of the law. The freedom of religion provided in art. 11 cannot be stretched to include such a right. (para 11)

(4) The amendment to the Ordinance was constitutional and that it was validly passed in 1978. (para 11)

Case(s) referred to:
A v. The Special Educational Needs & Disability Tribunal and Another [2003] EWHC 3368 ***(refd)***
Ahmad v. Inner London Education Authority [1978] QB 36 ***(refd)***
TATA Oil Mills Co Ltd v. KV Gopalan & Others LNIND [1965] SC 472 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 11(1), 74
Rules of Court 2012, O. 14A

For the plaintiff - In person
For the defendant - Norasiah Mohd Yusof; State Legal Adviser, Sabah

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is an application by the defendant to strike out the suit of the plaintiff under O. 14A of the Rules of Court 2012 ('ROC 2012') upon determination of two questions of law.

A **Claim Of The Plaintiff**

[2] The plaintiff is an advocate in Sabah. He is of the Christian faith. Shortly stated, his main complaint is that the Sabah State Legislative Assembly had amended the Holidays Ordinance in 1978 to the detriment of the Christians. Easter Saturday, Easter Monday and Boxing Day were removed from the public holiday list of the Holidays Ordinance. Easter Saturday is the day after Good Friday, whereas Easter Monday is the day after Easter and Boxing Day, which falls on 26 December, was an additional holiday for the Christmas celebration. Prior to 1978, all the said days were public holidays. Now, only Good Friday and Christmas remain as Christian religious celebration days which are accorded the status of public holidays in Sabah. The grounds of the complaint as stated in the statement of claim can be summarised as follows:

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D (a) The removal of the Christian celebration days as public holidays had violated his right to religious freedom under art. 11 of the Federal Constitution; and

(b) There was no consent obtained from the Christian churches and the view of the Christian populace was not sought before the said holidays were degazetted.

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[3] In this suit he is applying for the following reliefs:

(a) a declaration that the degazetting and abolition by the Defendant of the day following Good Friday and Easter Monday as public holidays is unlawful and *ultra vires* Article 11 of the Federal Constitution and the Holidays Ordinance of Sabah;

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(b) a mandatory injunction to the Defendant to regazette and reinstate the day following Good Friday and Easter Monday as public holidays under the Holidays Ordinance of Sabah;

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(c) a declaration that the degazetting and abolition by the Defendant of the day following Christmas Day as public holiday is lawful and *ultra vires* Article 11 of the Federal Constitution and the Holidays Ordinance of Sabah;

H (d) a mandatory injunction to the Defendant to regazette and reinstate the day following Christmas Day as public holiday under the Holidays Ordinance of Sabah;

Order 14A Application

I **[4]** Originally, the defendant applied to strike out the suit under O. 14A of the ROC 2012 upon the determination of the following questions of law:

(a) Whether the court has the power to question the validity of any proceedings in the Legislative Assembly of any State pursuant to Article 72(1) of the Federal Constitution; A

(b) Whether the court has power to question the power of the Legislature to make state laws or amend any state laws shall be exercised by Bills passed by the Legislative Assembly and assented to by the Yang di-Pertua Negeri as provided under Article 26(1) of the State Constitution; and B

(c) Whether the Plaintiff's claim is time barred pursuant to Section 3, Part I, item 1 of the Schedule of the Limitation Ordinance (Sabah Cap. 72). C

[5] Subsequently, the defendant reframed the questions of law without objection by the plaintiff. The questions of law that were posed by the defendant are:

(a) Whether the amendment to the Holiday Ordinance of Sabah is lawful under the Federal Constitution and State Constitution; and D

(b) Whether the amendment of the Holiday Ordinance of Sabah is in conflict with the provision of the Federal Constitution and State Constitution. E

Decision

[6] In my opinion, the two questions can be reduced to only one question, ie, whether the amendment to the Holidays Ordinance in 1978 was validly enacted by the Sabah State Legislative Assembly. If the answer to the question is in the affirmative, the suit of the plaintiff should be struck out. F

[7] The plaintiff's main argument is that the freedom of religion guaranteed under art. 11 of the Federal Constitution has been violated by the 1978 amendment to remove the said Christian holidays from the Holidays Ordinance of Sabah. His argument is summed in para. 10 of his written submission which I shall reproduce here: G

> These holidays were religious holidays and they are protected under my right to practice my faith under Article 11 of the Federal Constitution. There was no request from any Christian group or authority to call for the abolition of the said holidays which had a history of being celebrated for around a century or more. Why would anyone want to abolish something that has been around for a long time? There was no dialogue and consent from the local Christian churches before the abolition. H I

[8] The plaintiff has cited three authorities to support his case. The first case is *Ahmad v. Inner London Education Authority* [1978] QB 36; [1978] 1 All ER 574. In that case, a Muslim employee was not allowed to leave work for 45 minutes to go to mosque on Fridays. The majority of the Court of Appeal upheld his dismissal on the ground that the employee was not permitted to break his contract of employment by absenting himself from school during school hours to attend mosque on Fridays. However, the dissenting judge, Scarman LJ, held otherwise. His Lordships' decision was based on art. 9 of the European Convention on Human Rights which reads as follows:

> Article 9 - Freedom of thought, conscience and religion
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> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance.
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> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[9] The second case cited by plaintiff is *A v. The Special Educational Needs & Disability Tribunal and Another* [2003] EWHC 3368 (Admin). This case concerned the right of a Jewish pupil with disability to object to emplacement in a non-Jewish special school. The decision of the Special Educational Needs and Disability Tribunal's decision was quashed and sent for re-hearing before a freshly re-constituted panel. The third case that was cited by plaintiff was *TATA Oil Mills Co Ltd v. KV Gopalan & Others* LNIND [1965] SC 472. The Supreme Court held that the failure of an employer to recognise certain holidays, including Good Friday as a holiday for which wages were to be paid was a wrong decision. The above cases make interesting reading in respect of the way the courts have addressed the religious needs of individuals. However, in my opinion, all the above authorities are of no assistance in deciding the issue at hand. The above cases are not in respect of the validity or constitutionality of laws passed by the Legislature. In my opinion, the question posed in the O. 14A application can be answered solely by reference to the State and Federal Constitutions. My reasons are as follows.

[10] The first question that arises is whether the Sabah State Legislative Assembly had the power to amend the Holidays Ordinance in the first place. This question must be answer in the affirmative for obvious reasons. The legislative purpose of the Holidays Ordinance is

to provide for public holidays in Sabah. The distribution of legislative powers between the Federal Government and the State Governments is provided under Part VI of the Federal Constitution. Article 74 of the Federal Constitution provides that the Legislature of a State may make laws with respect to any of the matters enumerated in the State List which is the Second List set out in the Ninth Schedule. Item 8 of the Ninth Schedule reads, "State Holidays". In the premises, the subject matter of State Holidays is within the power the Sabah State Legislative Assembly to legislate upon. The second question that arises is whether the amendment is in conflict with the State or Federal Constitutions. The State and Federal Constitutions do not declare any religious holidays as public holidays. In the premises, it cannot be said that the removal of the religious holidays from the Holidays Ordinance directly conflicts with the State or Federal Constitutions. The plaintiff argued that the Federal Constitution provides for freedom of religion and therefore the removal of the said religious holidays is tantamount to a violation of the right enshrined in art. 11. Article 11(1) reads as follows:

> (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

[11] However, art. 11 does not provide a constitutional right to public holidays on religious observance days. The plaintiff has submitted that his right to religion includes public holidays on religious observance days. In my opinion, the right to practise and profess one's religion does not include any such right unless clearly provided by the letter of the law. The freedom of religion provided in art. 11 cannot be stretched to include such a right. Otherwise, there is no need for a Holidays Ordinance. Any ethnic or religious group will then be at liberty to declare any day which has religious or cultural significance as a public holiday. One can only imagine what sort of chaos this approach will cause to the economy and public life. The plaintiff submitted that there is nothing to stop the Legislature from removing even Christmas or Wesak Day from the Holidays Ordinance. This is clearly a rhetorical argument which does not merit consideration. However, I take judicial notice that there are a number of smaller religious groups whose religious holidays are not listed at all in the Holidays Ordinance and there is no complaint that they have been prevented from practising their religion. I am therefore of the opinion that the amendment to the Holidays Ordinance of Sabah is constitutional and that it was validly passed in 1978. The plaintiff's action is misconceived as his remedy does not lie with the courts but elsewhere. I shall therefore answer the first question in the affirmative and the second question in the negative and strike out the writ of summons and the statement of claim with costs of RM1,000.